

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Rules and Regulations Implementing the  
Telephone Consumer Protection Act of 1991

CG Docket No. 02-278

COMMENTS OF AMERICAN WATER WORKS COMPANY, INC. IN SUPPORT OF  
THE PETITION FOR EXPEDITED DECLARATORY RULING

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## BACKGROUND

On February 12, 2014, the Edison Electric Institute (“EEI”) and American Gas Association (“AGA”) filed a Petition For Expedited Declaratory Ruling (“Petition”) requesting that the Federal Communications Commission (“FCC” or “Commission”) confirm, under the Telephone Consumer Protection Act (“TCPA”),<sup>1</sup> that providing a telephone number to a utility constitutes “prior express consent” to receive, at that number, non-telemarketing, informational calls related to the customer’s utility service, which are placed using an automatic telephone dialing system (“autodialer”) or an artificial or prerecorded voice.<sup>2</sup>

As set forth in the Petition, EEI<sup>3</sup> and AGA<sup>4</sup> members often need to contact their customers, for example, to: provide notification about planned or unplanned service outages; provide updates about outages or service restoration; ask for confirmation of service restoration or information about the lack of service; provide notification of meter work, tree-trimming, or other field work; or warn about payment or other problems that threaten service curtailment.<sup>5</sup> With regard to such notifications, EEI and AGA state that their members have long used prerecorded message telephone calls and autodialers to reach their customers about service or other related issues.<sup>6</sup> As utility customers increasingly have transitioned to using wireless phones, EEI and AGA note that their members also have transitioned to using new technologies for notifying their customers, including using wireless-only technologies, such as text messaging.<sup>7</sup> Thus, according to EEI and AGA, its member utilities use automated texting technologies to notify

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<sup>1</sup> The TCPA is codified as 47 U.S.C. § 227. The Commission’s implementing rules are codified as 47 C.F.R. §64.1200. In relevant part, the TCPA prohibits any person within the United States from making “any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service . . . or any service for which the called party is charged for the call.” 47 U.S.C. § 227(b)(1).

<sup>2</sup> Petition for Expedited Declaratory Ruling, CG Docket No. 02-278, filed by Edison Electric Institute and American Gas Association on February 12, 2015, at 4 (“Petition”).

<sup>3</sup> EEI is the association that represents all U.S. investor-owned electric companies, and its members operate in all 50 states and the District of Columbia. *Id.* at 2.

<sup>4</sup> AGA represents more than energy utility companies that deliver natural gas to homes, businesses, and industries throughout the United States, and its members deliver 94 percent of all natural gas provided by the nation’s natural gas utilities. *Id.* at 2.

<sup>5</sup> *Id.* at 3. EEI and AGA state that some of these notifications are mandated by state regulation, some notifications have been adopted at the urging of regulatory authorities, and other notifications are viewed as critical to providing safe, efficient, and reliable service and meeting their obligations to the communities they serve. See Petition at 4.

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 5.

customers who have provided wireless numbers with information on service or other related issues.<sup>8</sup>

In light of these developments, EEI and AGA requested the Commission clarify that non-telemarketing, informational communications, placed using an autodialer or a prerecorded or artificial voice, to customers about their utility service at the number provided by the customer in connection with their utility service do not violate the TCPA.<sup>9</sup>

On February 24, 2015, the Commission issued a Public Notice seeking comment on this and any other issues raised in the Petition. As a regulated public utility in many jurisdictions, American Water Works Company, Inc. ("American Water"), shares many of the same regulatory requirements and concerns about customer notifications as the member companies of the AGA and EEI. Therefore, on behalf of American Water, please accept these comments in support of the Petition.

#### AMERICAN WATER COMMENTS IN SUPPORT OF THE PETITION

American Water provides high-quality water and wastewater services to approximately 15 million people in more than 1,600 communities in the United States. We are the largest investor-owned water and wastewater utility company in the United States. Our regulated public utility subsidiaries currently provide water and wastewater services in 15 states - California, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New Jersey, New York, Pennsylvania, Tennessee, Virginia and West Virginia. In each state we operate, water quality, service and rates are subject to extensive regulation by state public utility commissions, as well as environmental, health and safety and water quality regulations by federal, state and local governments. Our vast network of treatment plants, pumping stations, storage facilities, and approximately 45,000 miles of main and collection pipe, are all put to work each day to provide our customers with the highest-quality service.

We are acutely aware that water is the only utility product which is intended for customers to ingest and that our customers rely on us to provide them with safe and reliable water services. Water quality is of paramount importance to the health and well-being of our customers and beyond health and safety concerns, we know that our customers also have significant aesthetic concerns about the water that we treat and deliver to them. Ensuring the health and safety of our customers and protecting our product is the top priority for our Company and critical to our success. We also live in the

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<sup>8</sup> *Id.* at 5.

<sup>9</sup> *Id.* at 12.

communities that we serve, and our colleagues' and customers' safety is the most important thing we must focus on every day.

American Water engages in common and effective means of communication to inform its water and wastewater service customers of critical, service-related issues that are clearly in the public interest. These communications include notification of emergency conditions and procedures; service difficulties and progress in overcoming them; and appeals for the conservation of water. American Water has long used prerecorded message telephone calls and automatic telephone dialing systems to reach our customers about these service-related issues and is in the process of updating and expanding its communication efforts through wireless telecommunications methods, including text messaging.

American Water works together with federal, state, and local governments and regulators to ensure that it responds effectively to any service-affecting event. American Water's efforts also include developing and implementing notification programs to provide customers with the best and most-up-to-date information available regarding service issues, whether those issues are the result of planned or unplanned service outages, natural disasters, water quality issues (including "do not use" or "boil water" alerts), or other emergencies, or customer-related issues such as financial assistance programs, meter reading appointments, service appointments, and notice of routine flushing of the water mains in the system.

American Water is also keenly aware of the need to use utility resources efficiently in order to keep our water supply safe and reliable, to protect the environment and conserve natural resources, and to save customers money. American Water constantly works to help homes and businesses get more value from their dollar by informing our consumers about, and encouraging participation in, conservation and efficiency programs. This is done with the complete support or under mandates from our state public utility commissions throughout the country. Typically these programs are implemented to meet specific state "Best Practices" mandates regarding water conservation and efficiency.

## AMERICAN WATER CUSTOMER COMMUNICATIONS

Keeping customers informed is one of our main priorities. As our customers have increasingly transitioned to the use of wireless phones, American Water is transitioning to new technologies for reaching those customers, including wireless-only technologies, such as text messaging. The following are examples of situations when American Water sends autodialer communications to customers, including, but not limited to, service

installations, meter reading appointments, financial assistance programs and customer surveys.

#### American Water Initiated Communications:

For all American Water Direct Message Campaigns, the message is the same whether the answer type is a live caller or voicemail / answering machine.

- Service Interruption Message
- “Do not use” or “Boil water” alerts
- Ceasing of “do not use”/”boil alerts”
- Financial Assistance Messages
- Service appointments
- Meter reading appointments
- Debt collection
- Conservation outreach, especially in critical situations

American Water prides itself on effectively communicating to its customers the latest information that affects the customer’s account. It is important to note that this information is being communicated to assist our customers in order to provide them with important information related to their water and wastewater services and accounts. In fact, many of our customer notifications are mandated or urged by American Water’s state regulators throughout the country. The company’s customers also expect notification from the company about their service, and complain to state regulators when notifications are not made.

American Water also is in the process of updating and expanding its communication efforts through an outbound autodialer, e-mail and text messaging to mobile devices. As is evident by the variety of information American Water communicates to its customers, many of these communications, while in the public interest could be viewed as inconsistent with the TCPA if not sent under emergency conditions.

#### PETITION FOR DECLARATORY RULING

##### American Water Believes That Informational Calls to Numbers Provided to Utilities by Customers Do Not Require Additional Consent

In the 1992 TCPA Order, the Commission noted that “public utilities providing a third party notification service do not violate the prohibition against prerecorded calls to residences where the third party has given his or her prior express consent to the

notification.”<sup>10</sup> Notably, there the Commission also said that many calls made by utilities fall within the broad exemption for calls made for “emergency purposes.” Specifically, in the 1992 TCPA Order, the Commission found that “[s]ervice outages and interruptions in the supply of water, gas or electricity could in many instances pose significant risks to public health and safety, and the use of prerecorded message calls could speed the dissemination of information regarding service interruptions or other potentially hazardous conditions to the public.”<sup>11</sup> This, of course, comports with the legislative history of the TCPA, in which Congress explained that calls made for emergency purposes—and thus exempt from the TCPA—were “intended to include any automated telephone call that notifies consumers of impending or current power outages, whether those outages are for scheduled maintenance, unscheduled outages caused by storms, or power interruptions for load management programs.”<sup>12</sup>

Without a definitive ruling from the Commission about calls to their customers, utilities will be (and are today) reluctant to bear the significant litigation risk of making such calls. This is particularly true where those calls may not be considered emergency communications because they are, for instance, about service restoration, non-payment, energy usage, or conservation. In fact, the absence of a statement by the Commission that non-telemarketing, informational calls to a telephone number provided by customers to their utilities are made with “prior express consent” has created an opening that an aggressive plaintiffs’ bar has used against energy utilities for calls that bear no resemblance to the nuisance calls that spurred the enactment of the TCPA.<sup>13</sup>

One utility is currently defending a lawsuit in the federal court in the Northern District of Illinois<sup>14</sup> that provides a real-life example of the risk to which utilities are currently exposed. Commonwealth Edison (“ComEd”), seeking to improve the speed and efficiency of its communications with customers, adopted a “Power Outage Alert Program,” a two-way text-messaging program designed to allow ComEd to inform customers of power outages by text message and to allow customers to report an outage to the utility by text message. ComEd rolled this program out to all customers who provided a wireless telephone number as their contact number. The first message ComEd

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<sup>10</sup> 1992 TCPA Order ¶ 51.

<sup>11</sup> *Id.*

<sup>12</sup> Statement of Cong. Edward Markey, Chair, House Telecom. & Fin. Subcommittee, 137 Cong. Rec. H 11307-01 (Nov. 26, 1991); see also Statement of Sen. Ernest Hollings, Chair, Senate Committee on Commerce, Sci. & Transp., 137 Cong. Rec. S 18781-01 (Nov. 27, 1991) (“[T]he FCC could find that ‘emergency purpose’ includes any automated telephone call that notifies consumers of impending or current power outages, whether these outages are for scheduled maintenance, unscheduled outages caused by storms or similar circumstances, cut off power due to late payment of bills, power interruptions for load management programs, or other reasons.”).

<sup>13</sup> See 1992 TCPA Order ¶ 2; *Id.* ¶ 3.

<sup>14</sup> *Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.).



sent to enrollees informed them of the program and gave instructions on how to opt out, in case any of those customers did not want to receive the informational text messages.

This text messaging program was considered a violation of the TCPA by certain recipients. In the ComEd case, the plaintiff argued that a TCPA claim requires allegations only that the defendant (1) made text message calls, (2) using an autodialer, (3) to a wireless number. Plaintiff further stated that ComEd's arguments that the plaintiff consented to receive the messages or that the messages fall within the emergency exemption are affirmative defenses that cannot be resolved on a motion to dismiss.<sup>15</sup> Though some courts have found differently,<sup>16</sup> many courts have agreed.<sup>17</sup> This body of law creates an environment in which TCPA defendants who have consent, or make calls that are otherwise exempted, still must go through expensive discovery in order to defeat frivolous claims. And, of course, that does not account for the potential damages should the court rule against the utility.

Many of the communications that American Water makes to its customers are not emergency-related communications. Proactive communication to customers before, during or after natural disasters, service interruptions, water quality incidents, or other emergencies should not require consent. During natural disasters, many customers either evacuated and/or were later displaced so traditional communication was not the most effective method. However customers do keep their cell phones with them. It would be unfortunate, for American Water to risk facing fines and litigation for autodialing or sending text messages to customers in these circumstances.

As described above, they are non-telemarketing, informational communications to our customers, and are made to the number that the customer provided when establishing or continuing service. Given the current rule, it is not clearly defined that American Water's communications are exempt from the requirements of the TCPA. Without a clear definition by the Commission, American Water could be subject to significant fines and penalties for these types of communications. However, the most harmed by this interpretation of the rules, are utility consumers, who will not receive the critical and timely notifications that they need and deserve.

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<sup>15</sup> Plaintiff's Reply to Defendant's Mot. To Dismiss at 5, 7 (Mar. 21, 2014), *Grant v. Commonwealth Edison*, No. 1:13-cv-08310 (N.D. Ill.).

<sup>16</sup> See, e.g., *Hanley v. Green Tree Servicing, LLC*, 934 F. Supp. 2d 977, 982 (N.D. Ill. 2013).

<sup>17</sup> See, e.g., *Charvat v. Allstate Corp.*, 29 F. Supp. 2d 1147, 13-cv-7104, 2014 WL 866377, \*1; *Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 905 (N.D. Ill. 2012); *Robbins v. Coca-Cola Co.*, No. 13-cv-132, 2013 WL 2252646, \*2 (S.D. Cal. May 22, 2013); *Manfried v. Bennett Law, PLLC*, No. 12-cv-61548, 2012 WL 6102071, \*2 (S.D. Fla. Dec. 7, 2012).

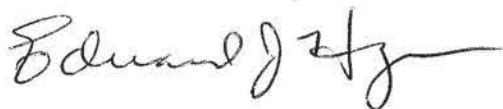
## CONCLUSION

American Water could face the risk of litigation as is evidenced by the ComEd lawsuit. This risk is creating a “chilling effect” and is deterring American Water and other utilities from using best practices to deliver vital information to its customers. Utility customers, as a result, are negatively impacted by not being able to receive important utility service communications due to the reluctance of utilities to use this method of communicating.

To the extent the Commission is concerned that customers might receive too many messages or messages that they would not want to receive, American Water agrees that an opt-out option should be available (as described above). In addition, state regulators would surely step in if utilities were seen by consumers to be sending too many or unwanted messages.

Therefore, in order to ensure customers receive important notifications, the FCC should clarify that a customer has given “prior express consent” to receive non-telemarketing, informational communications related to the customer’s utility service upon providing a phone number to the utility company.

Respectfully submitted,



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